

FENWICK & WEST LLP
ATTORNEYS AT LAW
SAN FRANCISCO

1 LAURENCE F. PULGRAM (CA State Bar No. 115163) (*pro hac vice*)
lpulgram@fenwick.com
2 CLIFFORD C. WEBB (CA State Bar No. 260885) (*pro hac vice*)
cwebb@fenwick.com
3 JENNIFER J. JOHNSON (CA State Bar No. 252897) (*pro hac vice*)
jjjohnson@fenwick.com
4 FENWICK & WEST LLP
5 555 California Street, 12th Floor
San Francisco, California 94104
6 Telephone: (415) 875-2300
Facsimile: (415) 281-1350

7 KURT OPSAHL (CA State Bar No. 191303) (*pro hac vice*)
kurt@eff.org
8 CORYNNE MCSHERRY (CA State Bar No. 221504) (*pro hac vice*)
corynne@eff.org
9 ELECTRONIC FRONTIER FOUNDATION
454 Shotwell Street
10 San Francisco, California 94110
Telephone: (415) 436-9333
11 Facsimile: (415) 436-9993

12 CHAD BOWERS (NV State Bar No. 7283)
bowers@lawyer.com
13 CHAD A. BOWERS, LTD
3202 West Charleston Boulevard
14 Las Vegas, Nevada 89102
Telephone: (702) 457-1001
15 Attorneys for Defendant and Counterclaimant
16 DEMOCRATIC UNDERGROUND, LLC, and
Defendant DAVID ALLEN

17 **UNITED STATES DISTRICT COURT**
18 **FOR THE DISTRICT OF NEVADA**

19 RIGHTHAVEN LLC, a Nevada limited liability company,
20 Plaintiff,
21 v.
22 DEMOCRATIC UNDERGROUND, LLC, a District of
Columbia limited-liability company; and DAVID ALLEN,
an individual,
23 Defendants.

24 DEMOCRATIC UNDERGROUND, LLC, a District of
Columbia limited-liability company,
25 Counterclaimant,
26 v.
27 RIGHTHAVEN LLC, a Nevada limited liability company,
and STEPHENS MEDIA LLC, a Nevada limited-liability
28 company,
Counterdefendants.

Case No. 2:10-cv-01356-RLH (GWF)

**DEFENDANT DEMOCRATIC
UNDERGROUND'S
CONSOLIDATED OPPOSITION
TO RIGHTHAVEN'S MOTION
TO INTERVENE [DKT 120] AND
OPPOSITION TO COUNTER-
DEFENDANT STEPHENS
MEDIA'S MOTION FOR
RECONSIDERATION[DKT 126]**

FENWICK & WEST LLP
ATTORNEYS AT LAW
SAN FRANCISCO

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION	1
ARGUMENT	5
I. STEPHENS MEDIA CANNOT MEET THE HIGH BURDEN REQUIRED FOR THIS COURT TO REVISIT ITS JUNE 14 DECISION.	5
A. Neither the “Clarification” nor the Restated Amendment to the SSA Constitute Newly Discovered Evidence Justifying Reconsideration.....	6
B. The Court’s June 14 Decision Did Not Result in a Manifest Injustice.....	9
C. Stephens Media May Not Reargue the Issues that It Lost.	10
II. EVEN UNDER THE NEWLY MINTED RESTATED AMENDMENT, RIGHTHAVEN HAS NO BASIS TO INTERVENE.....	11
A. Righthaven’s Request, Following Months of Litigation and its Dismissal, is Untimely.....	12
B. Stephens Media Would Adequately Protect Any Interest Righthaven Might Claim.....	13
C. Righthaven Has No Protectable Interest in this Litigation.....	14
III. THE RESTATED AMENDMENT CANNOT PROVIDE RIGHTHAVEN A BASIS TO INTERVENE OR STEPHENS MEDIA A BASIS FOR RECONSIDERATION AS IT PERPETUATES A FRAUD ON THE COURT.	25
A. Righthaven Has Repeatedly Misrepresented the True Nature of its Relationship with Stephens Media to this Court and Attempted to Hide it from Litigants and the Court.....	25
B. The Restated Amendment Is Just the Next Step in this Fraud.....	28
CONCLUSION	30

TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page(s)

CASES

American Plastic Equip., Inc. v. Toytrackerz, LLC,
No. 07-2253, 2010 WL 1284471 (D. Kan. Mar. 31, 2010) 8

Appling v. State Farm Mut. Auto. Ins. Co.,
340 F.3d 769 (9th Cir. 2003)..... 25

Arakaki v. Cayetano,
324 F.3d 1078 (9th Cir. 2003)..... 13

Backlund v. Barnhart,
778 F.2d 1386 (9th Cir. 1985)..... 6

Baucom v. Sisco Stevedoring, LLC,
No. 06-0785, 2008 WL 2428930 (S.D. Ala. June 12, 2008) 7

Bay County Bar Ass’n. v. Finance Sys., Inc.,
345 Mich. 434 (1956)..... 24

Biesek v. Soo Line R.R. Co.,
440 F.3d 410 (7th Cir. 2006)..... 7

Brown v. Kinross Gold, U.S.A.,
378 F. Supp. 2d 1280 (D. Nev. 2005) 6

Cal. Dept. of Toxic Substances Control v. Commercial Realty Projects, Inc.,
309 F.3d 1113 (9th Cir. 2002)..... 12

Christianson v. Colt Indus. Operating Corp.,
486 U.S. 800 (1988)..... 6

Clements v. Airport Auth. of Washoe County,
69 F.3d 321 (9th Cir. 1995)..... 3, 15, 26

Del Webb Communities, Inc. v. Partington,
2009 WL 3053709 (D. Nev. Sept. 18, 2009) 22

Del Webb Communities, Inc. v. Partington,
Case No. 10-15975 (9th Cir. July 20, 2011) 22

Dilks v. Aloha Airlines, Inc.,
642 F.2d 1155 (9th Cir. 1981)..... 14

Donnelly v. Glickman,
159 F.3d 405 (9th Cir. 1998)..... 11, 14

Duarte v. Bardales,
526 F.3d 563 (9th Cir. 2008)..... 8

FENWICK & WEST LLP
ATTORNEYS AT LAW
SAN FRANCISCO

FENWICK & WEST LLP
ATTORNEYS AT LAW
SAN FRANCISCO

TABLE OF AUTHORITIES
(Continued)

	<u>Page(s)</u>
1	
2	
3	
4	
5	
6	
7	
8	
9	
10	
11	
12	
13	
14	
15	
16	
17	
18	
19	
20	
21	
22	
23	
24	
25	
26	
27	
28	
<i>England v. Doyle</i> , 281 F.2d 304 (9th Cir. 1960).....	25
<i>Fahmy v. Jay-Z</i> , 261 F.R.D. 180 (C.D. Cal. 2009)	15
<i>Feist Publ’ns, Inc. v. Rural Telephone Serv. Co., Inc.</i> , 499 U.S. 340 (1991).....	16
<i>FM Indus., Inc. v. Citicorp Credit Servs., Inc.</i> , No. 07-C-1794, 2008 WL 4722086 (N.D. Ill. Oct. 21, 2008)	8, 16
<i>Fogerty v. Fantasy, Inc.</i> , 510 U.S. 517 (1994).....	13
<i>Frasure v. U.S.</i> , 256 F. Supp. 2d 1180 (D. Nev. 2003)	6, 9, 10
<i>Frazier v. Austin Explosives Co.</i> , No. C-10-2, 2010 U.S. Dist. LEXIS 57625 (S.D. Tex. June 10, 2010).....	14
<i>Garcia v. Berkshire Life Ins. Co. of America</i> , 569 F. 3d 1174 (10th Cir. 2009).....	25, 26
<i>Gardner v. Nike, Inc.</i> , 279 F.3d 774 (9th Cir. 2002).....	30
<i>Gerlinger v. Amazon.com Inc.</i> , 526 F.3d 1253 (9th Cir. 2008).....	17
<i>Green v. Ancora-Citronelle Corp.</i> , 577 F.2d 1380 (9th Cir. 1978).....	15
<i>Gruber v. Baker</i> , 20 Nev. 453 (Nev. 1890).....	22
<i>Grutter v. Bollinger</i> , 188 F.3d 394 (6th Cir. 1999).....	14
<i>Harris v. Emus Records Corp.</i> , 734 F.2d 1329 (9th Cir. 1984).....	30
<i>HyperQuest, Inc. v. N’Site Solutions, Inc.</i> , 559 F. Supp. 2d 918 (N.D. Ill. 2008)	17
<i>In re Brooms</i> , 447 B.R. 258 (9th Cir. BAP 2011).....	24
<i>In re Levander</i> , 180 F.3d 1114 (9th Cir. 1999).....	25

FENWICK & WEST LLP
ATTORNEYS AT LAW
SAN FRANCISCO

TABLE OF AUTHORITIES
(Continued)

	<u>Page(s)</u>
1	
2	
3	
4	
5	
6	
7	
8	
9	
10	
11	
12	
13	
14	
15	
16	
17	
18	
19	
20	
21	
22	
23	
24	
25	
26	
27	
28	
<i>In re Repurchase Corp.</i> , 332 B.R. 336 (Bankr. N.D. Ill. 2005).....	7
<i>Incline Energy, LLC v. Penna Group, LLC</i> , 2011 WL 1304710 (D. Nev. Apr. 1, 2011).....	22
<i>Jones v. Aero/Chem Corp.</i> , 921 F.2d 875 (9th Cir. 1990).....	7
<i>League of United Latin Am. Citizens v. Wilson</i> , 131 F.3d 1297 (9th Cir. 1997).....	12
<i>Lerner v. Fleet Bank</i> , 318 F.3d 113 (2d Cir.2003).....	17
<i>Liberty Mut. Ins. Co. v. FAG Bearings Corp.</i> , 335 F.3d 752 (8th Cir. 2003).....	16
<i>Lum v. Stinnett</i> , 87 Nev. 402 (Nev. 1971).....	22
<i>Martin v. Morgan Drive Away, Inc.</i> , 665 F.2d 598 (5th Cir. 1982).....	23
<i>Martinez v. Shinseki</i> , 2:09-cv-01354-RLH-RJJ, 2011 WL 9302 (D. Nev. Jan. 3, 2011).....	6, 10
<i>McDowell v. Calderon</i> , 197 F.3d 1253 (9th Cir. 1999).....	9
<i>N.L.R.B. v. Jacob E. Decker & Sons</i> , 569 F.2d 357 (5th Cir. 1978).....	7
<i>NAACP v. New York</i> , 413 U.S. 345 (1973).....	12
<i>Nafal v. Carter</i> , 540 F. Supp. 2d 1128 (C.D. Cal. 2007)	15, 21
<i>Nutter v. Clear Channel Commc’ns, Inc.</i> , No. 5:02-cv-157, 2006 WL 355181 (N.D. W.Va. Feb. 15, 2006).....	7, 8
<i>Pannonia Farms, Inc. v. Re/Max Int’l, Inc.</i> , 407 F. Supp. 2d. 41, 43 (D. D.C. 2005).....	17
<i>Perry v. Schwarzenegger</i> , 630 F.3d 898 (9th Cir. 2011).....	11, 12, 14
<i>Pest Comm. v. Miller</i> , 648 F. Supp. 2d 1202 (D. Nev. 2009).....	13

FENWICK & WEST LLP
ATTORNEYS AT LAW
SAN FRANCISCO

TABLE OF AUTHORITIES

(Continued)

Page(s)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Schwartz v. Eliades,
113 Nev. 586 (Nev. 1997)..... 22, 23

Silvers v. Sony Pictures Entm’t, Inc.,
402 F.3d 881 (9th Cir. 2005)..... *passim*

Spain v. EMC Mortgage Company,
No. 07-0308, 2009 WL 2590100 (D. Ariz. Aug. 20, 2009)..... 8

State of Wash. v. United States,
214 F.2d 33 (9th Cir. 1954)..... 7

Sybersound Records, Inc. v. UAV Corp.,
517 F.3d 1137 (9th Cir. 2008)..... 17

Tripati v. Henman,
857 F.2d 1366 (9th Cir. 1988)..... 15

United States v. Alexander,
106 F.3d 874 (9th Cir. 1997)..... 9

United States v. Mendoza,
464 U.S. 154 (1984)..... 15

Waite v. Cage,
No. 07-37770, 2011 WL 2118803 (S.D. Tex. May 27, 2011)..... 8

Williston Basin Interstate Pipeline Co. v. An Exclusive Gas Storage Leasehold & Easement in the Cloverly Subterranean,
524 F.3d 1090 (9th Cir. 2008)..... 17

Wyle v. R.J. Reynolds Indus., Inc.,
709 F.2d 585 (9th Cir. 1983)..... 25

STATUTES

17 U.S.C. § 101 21, 29

17 U.S.C. § 505 13

RULES

Fed. R. Civ. P. 24 11, 12

Fed. R. Civ. P. 26 28

Fed. R. Civ. P. 59 7, 8, 16

Fed. R. Civ. P. 60 7, 16

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES
(Continued)

Page(s)

OTHER AUTHORITIES

11 C. Wright & A. Miller, Federal Practice and Procedure: Civil § 2859 (1973)	7
William Patry, 2 PATRY ON COPYRIGHT (2009)	22, 23, 30

FENWICK & WEST LLP
ATTORNEYS AT LAW
SAN FRANCISCO

1 **INTRODUCTION**

2 Through their respective motions to intervene and for reconsideration, Righthaven LLC
3 (“Righthaven”) and Stephens Media LLC (“Stephens Media”) seek to circumvent this Court’s
4 ruling, made after exhaustive briefing, on June 14, 2011 (the “June 14 Decision”). *Righthaven*
5 *LLC v. Democratic Underground, LLC*, 2011 WL 2378186 (D. Nev. Jun. 14, 2011). The June 14
6 Decision rejected Righthaven’s claim to ownership of a genuine copyright interest in the News
7 Article, some 10% of which had been excerpted in a third party’s posting to the Democratic
8 Underground website. The Court held that Stephens Media was the real copyright owner,
9 notwithstanding Righthaven’s “disingenuous” and “egregious” assertions to the contrary based on
10 the original Strategic Alliance Agreement (Dkt. 102, Ex. 2 or “SAA”). It also held that
11 Righthaven could not, by purporting to amend the SAA after the fact, manufacture standing to
12 sue. And while the June 14 Decision expressed this Court’s “doubt” that the “cosmetic” changes
13 made through a purported “Clarification” (Dkt. 102 Ex. 3) of the SAA would meet the *Silvers* test
14 for standing (June 14 Decision at *4 n.1) two subsequent decisions in this District have gone
15 further and have rejected the sufficiency of the Clarification to meet the *Silvers* test in final
16 judgments that now amount to collateral estoppel. *Righthaven, LLC v. Hoehn*, 2:11-cv-00050-
17 PMP, 2011 WL 2441020 (D. Nev. June 20, 2011); *Righthaven, LLC v. Mostofi*, 2:10-cv-01066-
18 KJD, 2011 WL 2746315 (D. Nev. July 13, 2011).

19 The June 14 Decision and those that followed left Stephens Media in a predicament of its
20 own making. Having set up Righthaven as the vehicle to file hundreds of suits to extract nuisance
21 settlements, Stephens Media is now being called to account. Independent of Righthaven’s lack of
22 standing, this Court also held that Democratic Underground’s request for declaratory relief
23 against Stephens Media was appropriate, since Stephens Media had both threatened and instigated
24 the suit by its “little friend, Righthaven” on its behalf. And while the Court stated that
25 Democratic Underground could seek its attorneys’ fees against Righthaven, that entity’s financial
26 capacity to pay a fee award—having been set up to sue as a surrogate—is far more dubious than
27 that of Stephens Media.
28

1 Thus, in the present attempt to escape the June 14 Decision, Stephens Media filed a
2 motion for reconsideration, based on its argument that the May 9, 2011 Clarification of the SAA
3 successfully divested it of “real party in interest” status. Conversely, Righthaven, which
4 previously moved to voluntarily *dismiss* its claims against Democratic Underground (Dkt. 36),
5 albeit with improper conditions, has now moved to “intervene,” based on having purportedly
6 obtained ownership through the Clarification, and on the argument that Stephens Media cannot
7 defend the interests Righthaven previously sought to abandon.

8 Then, in an even more direct flouting of this Court’s orders, Righthaven and Stephens
9 Media ginned up a further amendment of the SAA that purports to recharacterize, *nunc pro tunc*,
10 their relationship for the past 18 months. Dated July 7, 2011 and labeled a “Restated
11 Amendment,” this document now forms the basis for both movants’ supplemental memoranda
12 asking to undo the June 14 Decision. Dkt. 134-1. This Restated Amendment purports to
13 fundamentally reframe the Righthaven/Stephens Media relationship, as if those parties can
14 collusively rewrite history – and avoid this Court’s determinations – by rewriting the documents
15 on which those determinations were based. It is actually quite a concept: if the owner of an asset
16 does not like losing in lawsuits about that asset, just give the asset away to an affiliate, and then
17 claim to be immune from suit.

18 For multiple reasons, the Court should deny both the motions for reconsideration and
19 intervention. There is no basis to grant reconsideration based on “new facts” where the only thing
20 new was invented after a Court’s prior decision—for no reason other than to undermine it.
21 Further, collateral estoppel precludes Righthaven’s assertion of standing to claim ownership and
22 bring this action. Dressing up this issue as a “motion to intervene” does not change the calculus.
23 Righthaven cannot seriously contend that there is no party that would adequately defend its
24 interest in its absence, since Stephens Media’s defense of the Counterclaim would do exactly that.

25 In all events, if this Court were to find it appropriate or necessary to analyze the third
26 version of the SAA presented in the Restated Amendment, it will find that this third time is no
27 charm. Righthaven and Stephens Media refuse to recognize that Righthaven’s right to litigate
28 these actions has been decided, and that its rights cannot be resurrected by further “clarification”

1 or “restatement” of agreements. While Righthaven and Stephens Media doubtless are
 2 disappointed, the reality is that *Hoehn*, 2011 WL 2441020, *Righthaven, LLC v. DiBiase*, 2:10-cv-
 3 01343-RLH, 2011 WL 2473531 (D. Nev. June 22, 2011), and *Mostofi*, 2011 WL 2746315, have
 4 each been reduced to a judgment. Each is not only precedent but subjects Righthaven to issue
 5 preclusion as to its standing to sue on the SAA, and as to its inability to cure its lack of standing
 6 by any amendment. See *Clements v. Airport Auth. of Washoe County*, 69 F.3d 321, 330 (9th Cir.
 7 1995) (issue preclusion—formerly known as collateral estoppel—bars “the re-litigation of an
 8 issue that has been actually litigated and necessarily decided”). Moreover, this Court’s June 14
 9 Decision —holding that Righthaven’s subsequent amendments could not resurrect its claim—was
 10 specifically adopted as the reasoning for the dismissal that underlies the judgment in *DiBiase*,
 11 further precluding relitigation of these issues. In addition, Righthaven has conceded that the June
 12 14 Decision is “law of the case.” Righthaven Motion to Intervene (Dkt. 120) at 3.

13 Accordingly, as a starting point for any analysis, the following issues have been
 14 conclusively determined and are beyond further dispute:

- 15 • “[T]he SAA in its original form qualifies the Assignment with restrictions or
 16 rights of reversion, such that in the end, Righthaven is not left with ownership
 of any exclusive rights.” *Hoehn*, 2011 WL 2441020, at *5.
- 17 • “[T]he SAA prevents Plaintiff from obtaining any of the exclusive rights
 18 necessary to maintain standing in a copyright infringement action.” *Mostofi*,
 2011 WL 2746315, at *5.
- 19 • “Righthaven and Stephens Media went to great lengths in the SAA to be sure
 20 that Righthaven did not obtain any rights other than the bare right to sue.
 Thus, the Court finds that **the plain language of the SAA conveys the intent
 21 to deprive Righthaven of any right, save for the right to sue alleged
 infringers and profit from such lawsuits.**” June 14 Decision at *4 (emphasis
 22 added).
- 23 • “Righthaven and Stephens Media may have wanted Righthaven to be able to
 24 sue, but the SAA was anything but silent in making sure that Stephens Media
 retained complete control over the Work rather than actually effectuate the
 25 necessary transfer of rights. The entirety of the SAA is concerned with making
 sure that Righthaven did not obtain any rights other than the right to sue.” *Id.*
 at *5.
- 26 • “[T]he SAA makes abundantly clear [that] Stephens Media *retained* the
 27 exclusive rights, never actually transferring them to Righthaven.” *Id.* at *6
 (emphasis original).

- 1 • The prior orders on motions to dismiss in this district that found standing based
2 upon the assignment alone “were tainted by Righthaven's failure to disclose the
3 SAA and Stephens Media’s true interest.” *Id.* at *6.¹
- 4 • The “May 9, 2011 Clarification ... does not provide Righthaven with any
5 exclusive rights necessary to bring suit.” *Hoehn*, 2011 WL 2441020, at *6²

6 Despite all of this, the present motions first proffered the Clarification, and now the
7 Restated Amendment, as clean slates proving that Righthaven has navigated around the
8 requirements of *Silvers*. Righthaven continues to claim that it and Stephens Media may avoid
9 these adverse rulings by reframing their relationship in as many inconsistent ways as they want,
10 for instance the Restated Amendment provides that “intent of the parties in entering into the SAA
11 and Amendment was to convey all ownership rights and interest in and to any identified Work to
12 Righthaven” (Restated Amendment at 1), the opposite of what this Court found to be the truth.

13 These mischaracterizations, regardless of the realities of Righthaven and Stephens
14 Media’s relationship, show how specious their entire “assignment” construct is. It would make a
15 mockery of this Court’s process to adopt the pretense that Righthaven now is in the business of
16 owning and licensing exclusive rights in copyrights, rather than merely suing on them, when it
17 has done, and is empowered to do, nothing else. This is especially true given Righthaven’s
18 history of false representation as to the nature of its relationship and Righthaven’s authority.
19 Transcript of this Court’s ruling at the July 14, 2011 sanctions hearing (Dkt. 137 or “OSC
20 Ruling”) at 15 (“The representations about the relationship and the right of Righthaven were
21 misrepresentations. They were misleading”). Righthaven should not be allowed to perpetuate its
22 fraud on the court by mischaracterizing its actual relationship and intentions again and seeking to
23 undue this Court’s prior decisions on that basis.

24
25 ¹ The “tainted” decisions are *Righthaven, LLC v. Vote For The Worst, LLC, et al.*, Case No. 2:10-cv-01045-KJD-
26 GWF (D. Nev. Mar. 30, 2011) (Dkt. 28); *Righthaven, LLC v. Majorwager.com, Inc.*, Case No. 2:10-cv-00484-GMN-
27 LRL, 2010 WL 4386499 (D. Nev. Oct. 28, 2010); *Righthaven, LLC v. Dr. Shezad Malik Law Firm P.C.*, Case No.
28 2:10-cv-00636-RLH-RJJ, 2010 WL 3522372 (D. Nev. Sept. 2, 2010).

² The *Hoehn* decision adopted the conclusion that the May 9, 2011 Clarification did not comport with *Silvers*
standard because Stephens Media maintained control over all exclusive rights, as argued by Democratic Underground
in its clause-by-clause analysis of the Clarification in this action. *See* Dkt. 107. We will not repeat those arguments
here, especially since the Clarification has now been superseded by yet another version.

1 In any event, Righthaven’s most recent Restated Amendment could not change the
 2 inherently unlawful nature of its relationship with Stephens Media, in either of two respects.
 3 First, this Court has already held that it was Righthaven’s intent not to receive any rights other
 4 than the right to share in the proceeds of another’s legal claims. June 14 Decision, at *3 (“In
 5 reality, Righthaven actually left the [SAA] transaction with nothing more than a fabrication since
 6 a copyright owner cannot assign a bare right to sue after *Silvers*. To approve of such a transaction
 7 would require the Court to disregard the clear intent of the transaction and the clear precedent set
 8 forth by the *en banc* Ninth Circuit in *Silvers*”). This relationship by definition constitutes
 9 champerty, an illegal practice under Nevada law. *Ex post facto* amendments cannot obscure the
 10 champertous nature of Righthaven’s pursuit of Stephens Media’s claims: Righthaven’s
 11 agreements and assignments with Stephens Media are therefore an illegal nullity that can never
 12 form the basis for Righthaven to sue or provide any right to intervene.

13 Second, as persuasively argued by Amicus Citizens against Litigation Abuse, and as this
 14 Court also recognized at the OSC hearing, the entire Righthaven scheme constitutes the unlawful,
 15 unauthorized practice of law. OSC Ruling at 14 (holding that Righthaven is nothing “but a law
 16 firm with a contingent fee agreement masquerading as a company that’s a party”). For this reason
 17 too, Righthaven’s agreements and assignments with Stephens Media must be disregarded, and its
 18 claim to standing to intervene—or to sue again—rejected.

19 Righthaven’s repeated machinations and motions have multiplied the complexity of this
 20 matter. But it all still adds up to one straightforward conclusion: Righthaven has no standing to
 21 pursue any action based on the purportedly assigned copyright here, and, accordingly, no interest
 22 in this litigation to protect by intervention. Stephens Media remains the real party in interest, and
 23 cannot justify reconsideration based on newly created evidence. Enough is enough. Both
 24 motions should be denied, and the case should proceed in accordance with the June 14 Decision.

ARGUMENT

I. STEPHENS MEDIA CANNOT MEET THE HIGH BURDEN REQUIRED FOR THIS COURT TO REVISIT ITS JUNE 14 DECISION.

28 This Court correctly denied Stephens Media’s motion to dismiss or strike Democratic

1 Underground's counterclaim. Stephens Media's current motion for the Court to reconsider its
 2 June 14 Decision must also be denied, as Stephens Media cannot demonstrate the highly unusual
 3 circumstances required for reconsideration. *See Christianson v. Colt Indus. Operating Corp.*, 486
 4 U.S. 800, 817 (1988) (holding that "courts should be loathe [to revisit prior decisions of their
 5 own] in the absence of extraordinary circumstances").

6 A motion for reconsideration could be appropriate only if "the district court (1) is
 7 presented with newly discovered evidence, (2) committed clear error or the initial decision was
 8 manifestly unjust, or (3) if there is an intervening change in the controlling law." *Sch. Dist. No.*
 9 *IJ, Multnomah County v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993). Stephens Media
 10 demands that this Court revisit its June 14 Decision on the basis of "newly discovered evidence"
 11 or alternatively "manifest injustice."³ However, Stephens Media has not and cannot identify
 12 either "facts or law of a strongly convincing nature" that might justify reconsideration. *Frasure v.*
 13 *U.S.*, 256 F. Supp. 2d 1180, 1183 (D. Nev. 2003); *Martinez v. Shinseki*, 2:09-cv-01354-RLH-RJJ,
 14 2011 WL 9302, at *1 (D. Nev. Jan. 3, 2011). In addition, Stephens Media impermissibly uses its
 15 motion to rehash arguments already made. *See Backlund v. Barnhart*, 778 F.2d 1386, 1388 (9th
 16 Cir. 1985); *Brown v. Kinross Gold, U.S.A.*, 378 F. Supp. 2d 1280, 1288 (D. Nev. 2005) (holding
 17 that "[a] motion for reconsideration is not an avenue to re-litigate the same issues and arguments
 18 upon which the court already has ruled").

19 **A. Neither the "Clarification" nor the Restated Amendment to the SSA**
 20 **Constitute Newly Discovered Evidence Justifying Reconsideration.**

21 Stephens Media's motion for reconsideration was initially based on its contention that the
 22 Court's June 14 Decision "did not consider the effect of the [May 9] Amendment [aka the
 23 Clarification] on the issue of standing because its analysis was limited to the jurisdictional
 24 allegations existing at the time of the complaint," and therefore that the Clarification "potentially
 25 qualif[ies]" as new evidence. Motion for Reconsideration (Dkt. 126) at 7. This argument is
 26 meritless. The May 9 Clarification was presented to the Court and its impact fully briefed in
 27

28 ³ Stephens Media does not attempt to argue that there has been an intervening change in controlling law, and no such change has occurred.

1 connection with Stephens Media’s Motion to Dismiss. Indeed, the Clarification was executed the
 2 day before Stephens Media responded to Democratic Underground’s brief that provided the Court
 3 with the SAA, in an obvious, if vain, effort to bolster that response.

4 Undeterred, Stephens Media created the new Restated Amendment on July 7, 2011 and
 5 now claims that it is “newly discovered evidence.” Dkt. No. 136. Nonsense. Reconsideration,
 6 like a new trial or relief from judgment, can only be based on evidence that existed at the time the
 7 issues in dispute were considered—in other words, the evidence must be newly *discovered*, not
 8 newly *created*.⁴ *Jones v. Aero/Chem Corp.*, 921 F.2d 875, 878 (9th Cir. 1990) (motion for
 9 reconsideration of judgment must show the evidence existed at the time judgment was rendered);
 10 *State of Wash. v. United States*, 214 F.2d 33, 46 (9th Cir. 1954) (newly discovered evidence
 11 “refers to evidence in existence at the time of trial, which by exercise of reasonable diligence was
 12 not discoverable prior to trial.”); *N.L.R.B. v. Jacob E. Decker & Sons*, 569 F.2d 357, 364 (5th Cir.
 13 1978) (applying “often stated” norm that “the evidence must be in existence at the time of the
 14 trial” in the context of a National Labor Relations Board hearing); *Biesek v. Soo Line R.R. Co.*,
 15 440 F.3d 410, 412 (7th Cir. 2006) (declining to consider a stipulation, signed after dismissal of
 16 suit, that was “newly created rather than newly discovered”); *In re Repurchase Corp.*, 332 B.R.
 17 336, 344 (Bankr. N.D. Ill. 2005), *aff’d sub nom. Repurchase Corp. v. Bodenstein*, 05 B 32933,
 18 2008 WL 4379035 (N.D. Ill. Mar. 24, 2008) (holding that post-hearing effort to correct
 19 deficiencies in bankruptcy reorganization plan represented “newly created evidence” that cannot
 20 be deemed as “newly discovered”); *Baucom v. Sisco Stevedoring, LLC*, No. 06-0785, 2008 WL
 21 2428930, at *5 (S.D. Ala. June 12, 2008) (denying reconsideration motion based on “newly
 22 created evidence”); *Nutter v. Clear Channel Commc’ns, Inc.*, No. 5:02-cv-157, 2006 WL 355181
 23 (N.D. W.Va. Feb. 15, 2006)(discussing denial of motion to alter or amend judgment finding lack
 24 of standing where plaintiff subsequently purchased copyright). The principle that previously
 25 nonexistent evidence cannot be considered “newly discovered” for purposes of reconsideration is

26 _____
 27 ⁴ Motions for reconsideration may be brought pursuant to Federal Rules of Civil Procedure 59 or 60(b) or by
 28 discretion of the court, based on timing of the motion and the order or judgment or trial for which reconsideration is
 sought. “The same standard applies to motions on the ground of newly discovered evidence whether they are made
 under Rule 59 or Rule 60(b)(2).” *Jones*, 921 F.2d at 878 (*citing* 11 C. Wright & A. Miller, *Federal Practice and
 Procedure: Civil* § 2859 (1973)).

1 critical “for the obvious reason that to allow such a procedure could mean the perpetual
2 continuation of all trials” or other adjudications. *Id.*

3 In *American Plastic Equip., Inc. v. Toytrackerz, LLC*, for example, the court denied a
4 motion to reconsider its dismissal of a copyright infringement suit where plaintiff could not
5 establish ownership of the copyrights in question. The court held that a retroactive *nunc pro tunc*
6 assignment, introduced after the dismissal order was entered, was “not ‘newly discovered’
7 evidence but rather ‘newly created’ evidence.” No. 07-2253, 2010 WL 1284471, at *10 (D. Kan.
8 Mar. 31, 2010). *Accord FM Indus., Inc. v. Citicorp Credit Servs., Inc.*, No. 07-C-1794, 2008 WL
9 4722086, *1–*2 (N.D. Ill. Oct. 21, 2008) (rejecting post-ruling efforts to cure copyright
10 ownership deficiency through introduction of a transfer document that was “newly created for
11 purposes of litigation, not newly discovered evidence”).

12 Likewise, in *Spain v. EMC Mortgage Company*, the court rejected as newly discovered
13 evidence a “correction” to a property deed that sought to cure a standing deficiency. No. 07-
14 0308, 2009 WL 2590100 (D. Ariz. Aug. 20, 2009). The plaintiff had asked the court to
15 reconsider its finding that, as solely a beneficiary of a trust, plaintiff was not the real party in
16 interest and did not have standing to sue. The plaintiff based its request on an amended deed with
17 language conveying the property to plaintiff as an individual, instead of as a beneficiary. Because
18 the corrected deed did not exist “at the time of the proceeding at which the ruling now protested
19 was entered,” however, the court declined to consider the correction and denied the motion. *Id.* at
20 *5 (citing *Duarte v. Bardales*, 526 F.3d 563, 573 (9th Cir. 2008)).

21 Another recent opinion similarly rejected a party’s efforts to correct deficiencies in a
22 transfer of contracts that the court had previously deemed void. *Waite v. Cage*, No. 07-37770,
23 2011 WL 2118803 (S.D. Tex. May 27, 2011). Appellants sought reconsideration based on
24 acquisition of a retroactively effective license that would enable the transfer appellants sought to
25 effect. Because appellants did not hold the license on the date that the relevant petition and
26 motions were filed, and therefore “did not ‘discover’ evidence regarding the licenses but, instead,
27 created such evidence,” the court upheld denial of the motion to reconsider. *Id.* at *4.

28 Regardless of whether a court is considering a motion brought under Rules 59 or 60, following a

1 judgment or trial, or for reconsideration of an interlocutory order, this same standard focusing on
2 “newly discovered” evidence applies. *See generally Frasure*, 256 F. Supp. 2d at 1183.

3 Stephens Media cannot manufacture evidence after the fact and properly deem it “newly
4 discovered” for purposes of reconsideration. If Stephens Media or Righthaven wished to proceed
5 based on a contractual relationship different from what they presented to the Court—and, indeed,
6 diametrically opposed to their intent as found by the Court—they should have submitted evidence
7 of that purported relationship to the Court prior to its decision, not massage the facts thereafter.

8 **B. The Court’s June 14 Decision Did Not Result in a Manifest Injustice.**

9 Stephens Media attempts to identify an injustice that would justify reconsideration by
10 arguing that it lacks standing to sue for infringement on its own behalf. It conveniently ignores
11 this Court’s June 14 Decision, which is unequivocal: “If Stephens Media wishes to assert claims
12 against Democratic Underground, it may do so separately.” June 14 Decision at *6. The only
13 basis upon which Stephens Media is even arguably disabled from litigating its own copyright is
14 its own contention that it retroactively transferred those rights *after* this Court found that it could
15 sue on them. By this rationale, anyone that does not want to be a party to a lawsuit over one of its
16 assets may simply transfer its rights to an affiliate, and thereby avoid the forum in which it was
17 sued, avoid discovery, and avoid being bound by the merits of the decision. Stephens Media cites
18 no principle that allows that result—and none exists.

19 Moreover, manifest injustice is a high bar, and it cannot be reached by rewriting the facts
20 post-decision to create the purported injustice. Indeed, even if it had not expressly affirmed
21 Stephens Media’s ability to sue, the June 14 Decision would not have been manifestly unjust.
22 Reflecting the exceptional nature of the standard, the Ninth Circuit found no manifest injustice
23 (and overturned a grant of reconsideration) where a criminal defendant’s confession was
24 suppressed based in part on subsequently impeached testimony. *United States v. Alexander*, 106
25 F.3d 874, 878 (9th Cir. 1997). Likewise, the Ninth Circuit affirmed a denial of reconsideration
26 despite a district court’s questionable decision to prohibit disclosure of evidence in a habeas
27 petition. *McDowell v. Calderon*, 197 F.3d 1253, 1255-56 (9th Cir. 1999) (finding no clear error).
28 Stephens Media’s brief presents no cases in which reconsideration was even sought, much less

1 granted, on the basis of manifest injustice. *See generally* Motion for Reconsideration. It
 2 references one case in which a defendant in a negligence action alleged the related principle of
 3 “clear error” by the district court, *Frasure*, 256 F. Supp. 2d at 1180, but that holding weighs
 4 against its motion as the court found no clear error and denied reconsideration.

5 Further, Stephens Media had (and has) numerous ready solutions to its self-inflicted
 6 quandary. It could have accepted this Court’s June 14 Decision, as well as the *Hoehn* judgment’s
 7 conclusion that the Clarification was ineffective to transfer ownership, and sued in its own name
 8 as this Court authorized. It could have foregone the Restated Amendment, instead of executing
 9 that document in an attempt to divest itself of ownership. It could now, with one more stroke of a
 10 pen, amend its relationship with Righthaven to rescind that Restated Amendment, just as it has
 11 repeatedly done before. Finally, Stephens Media remains free at any time to moot the “case or
 12 controversy” question by simply providing an unequivocal covenant not to sue, as Democratic
 13 Underground has explained in its earlier briefing. *See* Dkt. 108 at 4-5.

14 Stephens Media’s assertion that it cannot bring suit against Democratic Underground, a
 15 belief to which it clings in the face of assurances to the contrary and based on its own post-
 16 decision recharacterization of the SAA, is not an injustice, let alone a manifest injustice requiring
 17 this Court to reconsider its June 14 Decision.

18 **C. Stephens Media May Not Reargue the Issues that It Lost.**

19 Stephens Media’s motion for reconsideration also improperly rehashes arguments it
 20 already made and lost. *See Martinez*, 2011 WL 9302, at *2 (holding that a “motion for
 21 reconsideration is not an avenue to relitigate the same issues and arguments upon which the court
 22 already has ruled”). The Motion repeats the earlier filings in which Righthaven (joined by
 23 Stephens Media) submitted the Clarification and argued its significance pending the Court’s June
 24 14 Decision. Dkt. 126 at 4.⁵

25 Stephens Media has argued throughout its briefs, as it argues again here, that it is not the

26 ⁵ Stephens Media does not offer any arguments as to the significance of the Restated Amendment, merely stating
 27 that it “wishes to make the Court aware of the Amended and Restated Amendment so that it has the most current
 28 information regarding the contractual relationship between the parties.” Dkt. 126 at 2:26-28. While this Court could
 construe this to mean that Stephens Media has abandoned the arguments made about the defunct Clarification, to the
 extent these arguments are meant to apply to the Restated Amendment, they remain impermissible.

1 real party in interest; this Court disagreed, as has every other court to consider the issue. *See*,
 2 *e.g.*, *Hoehn*, 2011 WL 2441020, *DiBiase*, 2011 WL 2473531, and *Mostofi*, 2011 WL 2746315.
 3 For example, Righthaven’s Response to Democratic Underground’s Supplemental Memorandum
 4 (Dkt. 100), which Stephens Media joined, argued that the SAA’s “right of reversion provision
 5 [does not] have any impact on Righthaven’s present standing to sue for past infringement.” Dkt.
 6 No. 100 at 7:7-8. Stephens Media makes the same argument in its present Motion, contending
 7 that rights of reversion do not alter the effect of the transfer. Dkt. 126 at 11. Similarly, the same
 8 Supplemental Memorandum Response asserted, based on the Clarification, that Stephens Media
 9 is a non-exclusive licensee of Righthaven and therefore does not have standing to sue for
 10 infringement. Dkt. 100 at 9. In its Motion, Stephens Media again contends that it is merely a
 11 non-exclusive licensee lacking standing under the Clarification. Dkt. 126 at 7, 8, 10. In addition,
 12 both briefs exhaustively pursue the argument that Stephens Media’s assignment to Righthaven
 13 comports with *Silvers v. Sony Pictures Entm’t, Inc.*, 402 F.3d 881 (9th Cir. 2005). *See, e.g.*, Dkt.
 14 100 at 2, 4-6, 8-10; Dkt. 126 at 4, 7-8, 10, 12-13. Stephens Media essentially uses its motion for
 15 reconsideration to remake arguments already included in its earlier briefing, which it may not do.

16 Stephens Media cannot demonstrate any valid basis for this Court to revisit its June 14
 17 Decision, much less the extraordinary circumstances required to justify reconsideration. The
 18 Court therefore should deny Stephens Media’s Motion.

19 **II. EVEN UNDER THE NEWLY MINTED RESTATED AMENDMENT,**
 20 **RIGHTHAVEN HAS NO BASIS TO INTERVENE.**

21 As a prerequisite to intervention as a matter of right, an applicant under Federal Rule of
 22 Civil Procedure 24(a)(2) must make four showings: that “(1) it has a ‘significant protectable
 23 interest’ relating to the property or transaction that is the subject of the action; (2) the disposition
 24 of the action may, as a practical matter, impair or impede the applicant’s ability to protect its
 25 interest; (3) the application is timely; and (4) the existing parties may not adequately represent the
 26 applicant’s interest.” *Perry v. Schwarzenegger*, 630 F.3d 898, 903 (9th Cir. 2011) (*quoting*
 27 *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998)). The applicant bears the burden of
 28 showing that its intervention is warranted under this standard, and a failure on any element is fatal

1 to intervention. *Id.* at 903-05. Righthaven’s motion fails to meet every prong of this test.

2 **A. Righthaven’s Request, Following Months of Litigation and its Dismissal, is**
 3 **Untimely.**

4 Timeliness under Rule 24 “is to be determined from all the circumstances. And it is to be
 5 determined by the court in the exercise of its sound discretion.” *NAACP v. New York*, 413 U.S.
 6 345, 366 (1973) (upholding denial of motion to intervene). In making this determination, the
 7 Ninth Circuit generally considers three factors: (1) the stage of the proceeding at which an
 8 applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for and length of
 9 the delay. *See, e.g., Cal. Dept. of Toxic Substances Control v. Commercial Realty Projects, Inc.*,
 10 309 F.3d 1113, 1119 (9th Cir. 2002). Not surprisingly, where the court has already substantially
 11 engaged in pretrial proceedings, as here, intervention is disfavored. *League of United Latin Am.*
 12 *Citizens v. Wilson*, 131 F.3d 1297, 1303 (9th Cir. 1997) (“the fact that the district court has
 13 substantively – and substantially – engaged the issues in this case weighs heavily against allowing
 14 intervention”). Further, prejudice to the parties caused by the proposed intervenor’s delay is
 15 considered “the most import factor” for determining timeliness. *Petrol Stops Northwest v.*
 16 *Continental Oil Co.*, 647 F.2d 1005, 1010 (9th Cir. 1981) (affirming denial of intervention
 17 request because late stage intervention by party would cause great prejudice to existing party).

18 Righthaven’s offers a single sentence contending that its proposed intervention is timely
 19 because “Righthaven filed this Application within days after the Court’s Order dismissing it from
 20 the case.” Dkt. 120 at 4. What this argument forgets is (i) the ten months of litigation it pursued
 21 under both the original SAA and Clarification before attempting to invent this new ground to
 22 intervene, during which this litigation has gone through countless rounds of briefing and
 23 discovery disputes, now totaling almost 140 docket entries; (ii) the prejudice to Democratic
 24 Underground, which (like this Court), devoted substantial efforts to address the issues of standing
 25 surrounding Righthaven’s misguided copyright enforcement scheme⁶; and (iii) the reason for this
 26 delay—Righthaven’s sanctionable conduct in misrepresenting to the Court its lack of actual

27 ⁶ That prejudice includes that, before Righthaven moved to intervene, Magistrate Judge Foley heard, but then
 28 dismissed as “moot” a major discovery motion aimed at Righthaven and Stephens Media’s communications and
 intentions in creating the SAA, due to this Court’s June 14 Decision. Dkt. 95.

1 ownership. Under the three factors governing timeliness, it is far too late to intervene.

2 **B. Stephens Media Would Adequately Protect Any Interest Righthaven Might**
3 **Claim.**

4 Where, as here, an applicant's interests are sufficiently represented by a party present in
5 the lawsuit, such as a party with a similar interest in ensuring the same outcome, adequate
6 representation is presumed and the would-be-intervenor must come forward with a "compelling
7 showing" to rebut it. *See, e.g., Arakaki v. Cayetano*, 324 F.3d. 1078, 1086 (9th Cir. 2003)
8 (intervention not allowed where present parties shared the same ultimate objective); *Pest Comm.*
9 *v. Miller*, 648 F. Supp. 2d 1202 (D. Nev. 2009) (Hunt, J.) (same); Dkt. 120 at 9 (recognizing that
10 "compelling showing" is required where parties share common ultimate objective). Thus, even
11 assuming, contrary to fact, that Righthaven had some copyright interest to protect in this lawsuit
12 (*see infra* Part II(C)), Stephens Media will stand in its shoes for the purpose of this litigation.

13 Indeed, Stephens Media is well-placed to defend Democratic Underground's
14 counterclaim. Righthaven concedes that "Stephens Media has an interest in seeing that the
15 declaratory judgment claim is refuted." Dkt. 120 at 9. Moreover, Stephens Media itself also
16 owns 50% of Righthaven through its affiliate SI Content Monitor, which has invested heavily in
17 the enterprise. Webb Decl. Ex. 1; Righthaven Operating Agreement ("RHOA," Dkt. 107-2) Ex.
18 18-1; SSA § 2 (providing that Righthaven must be owned by Stephens Media affiliate controlled
19 by the same entities that control Stephens Media). Finally, Stephens Media is strongly
20 incentivized by the Copyright Act's attorneys' fees provisions to resist any finding of non-
21 infringement, lest Democratic Underground would be found to be a prevailing party entitled to an
22 award of its fees. *See* 17 U.S.C. § 505; *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 527 (1994).

23 Righthaven nonetheless argues that Stephens Media would not adequately protect its
24 interest in this lawsuit under the theory that the Restated Amendment's labeling of Stephens
25 Media as a mere "non-exclusive licensee" might give rise to a new standing defense. Dkt. 120
26 at 9. This is a potential problem of Righthaven's making, based entirely on the Restated
27 Amendment it strategically designed, and about which it therefore can hardly complain.

28 In any event, even ignoring that this Court has held that Stephens Media *is* the real party

1 in interest and remains subject to the counterclaim, there is no basis to rebut a presumption of
 2 adequate representation. Righthaven suggests that because Stephens Media has an *additional*
 3 defense (standing) that Righthaven does not have, it cannot adequately represent Righthaven's
 4 supposed interest in this case. This is precisely *not* the rule. An intervenor's interest will be
 5 found inadequately represented when the *intervenor* possesses additional defenses that could not
 6 be raised by the present parties, not the other way around. *See e.g., Grutter v. Bollinger*, 188 F.3d
 7 394, 401 (6th Cir. 1999) (finding intervenor's interest would not be adequately represented, and
 8 thus that intervention was proper, because *intervenor had additional defenses* that would likely
 9 not be raised by the present defendant).

10 The fallacy in Righthaven's position is patent when one considers the possible outcomes
 11 of Stephens Media's standing defense. If, as this Court already held, Stephens Media is subject to
 12 the counterclaim, it has every incentive to defend on the merits. If we assume the unlikely event
 13 that Stephens Media were successful in showing no case or controversy, what is the ultimate
 14 harm to Righthaven's asserted interest? None. There would be no adjudication on the merits on
 15 infringement and no prejudice whatsoever to Righthaven.

16 **C. Righthaven Has No Protectable Interest in this Litigation.**

17 To meet the requirement for intervention, an applicant must also demonstrate a "direct,
 18 non-contingent, substantial and legally protectable" interest. *Dilks v. Aloha Airlines, Inc.*, 642
 19 F.2d 1155, 1157 (9th Cir. 1981). This means that the applicant must come forward with "(1) . . .
 20 an interest that is protected under some law, and (2) [demonstrate] a 'relationship' between its
 21 legally protected interest and the . . . claims." *Donnelly*, 159 F.3d at 409. Where an applicant's
 22 stated basis for intervention is the pursuit of legal claims, as here, a failure of those claims either
 23 on the merits or based on a lack of standing forecloses the possibility of any substantial interest.
 24 *Perry*, 630 F.3d at 906 (in the permissive intervention context, while Article III standing is not
 25 necessarily required for intervention, where "the specific interest Movant's claim in the litigation
 26 would require them to have standing," a lack of standing bars intervention); *Frazier v. Austin*
 27 *Explosives Co.*, No. C-10-2, 2010 U.S. Dist. LEXIS 57625, at *15 (S.D. Tex. June 10, 2010)
 28 (lack of standing to pursue claims of patent infringement bars intervention in infringement suit);

1 *Fahmy v. Jay-Z*, 261 F.R.D. 180, 187 (C.D. Cal. 2009) (denying motion to intervene in
 2 continuing litigation by Plaintiff in *Nafal v. Carter*, following its dismissal on standing grounds
 3 under *Silvers* (540 F. Supp. 2d 1128 (C.D. Cal. 2007) in part because it amounted to an attempt to
 4 relitigate the issue).⁷ Where no such interest exists, necessarily, there is no risk of impairment.

5 **1. Righthaven Is Barred from Arguing that it Has a Significant Interest**
 6 **in this Litigation by Collateral Estoppel.**

7 As noted above, Righthaven’s application to intervene is based on the idea that any
 8 adjudication of non-infringement would impair its rights because it has purportedly become the
 9 sole owner of the copyright at issue in this case. Dkt. 134 at 1; Dkt. 120 at 4. Righthaven is
 10 mistaken for several reasons. The first is that Righthaven is barred by the doctrine of issue
 11 preclusion from even arguing that it can cure its lack of standing by amendment.

12 The doctrine of issue preclusion—formerly known as collateral estoppel—bars a party
 13 from relitigating issues actually and necessarily decided against them in previous cases.
 14 *Clements*, 69 F.3d at 330; *see also United States v. Mendoza*, 464 U.S. 154, 159 n.4 (1984)
 15 (“Defensive use of collateral estoppel occurs when a defendant seeks to prevent a plaintiff from
 16 relitigating an issue the plaintiff has previously litigated unsuccessfully.”); *Green v. Ancora-*
 17 *Citronelle Corp.*, 577 F.2d 1380, 1383-1384 (9th Cir. 1978) (recognizing that non-party to
 18 original action may rely on issue preclusion to bar relitigation of issues actually and necessarily
 19 decided against a party). This is true even where the defendant seeking to rely on the doctrine of
 20 issue preclusion was not a party to the original action (*see Green*, 577 F.2d at 1383-1384), or if
 21 Righthaven seeks to appeal all the judgments at issue.⁸ *See Tripathi v. Henman*, 857 F.2d 1366,
 22 1367 (9th Cir. 1988) (“The established rule in the federal courts is that a final judgment retains all
 23 of its res judicata consequences pending decision of the appeal To deny preclusion in these
 24 circumstances would lead to an absurd result: Litigants would be able to refile identical cases
 25 while appeals are pending, enmeshing their opponents and the court system in tangles

26 _____
 27 ⁷ As the Court will recall from the briefing on the effect of the Clarification on Righthaven’s motion to dismiss, the
 court in *Nafal* found a lack of standing to pursue a copyright infringement action where the practical realities of the
 transaction showed that the purported assignee lacked any real ability to exploit the work. *See* Dkt. 107.

28 ⁸ Righthaven has filed a notice of appeal in *Hoehn* and *DiBiase*. *Hoehn*, Dkt. 33; *DiBiase*, Dkt. 81.

1 of duplicative litigation.”) (citations omitted).

2 Issue preclusion applies not merely to the precise issues litigated by a party, but also to
 3 “all arguments and evidence that could be presented to resolve the issue.” *See, e.g., Liberty Mut.*
 4 *Ins. Co. v. FAG Bearings Corp.*, 335 F.3d 752, 762 (8th Cir. 2003). While the courts will at times
 5 allow “newly discovered” evidence to avoid the preclusive effect of a judgment in a subsequent
 6 suit, this is only where it was not absent from the previous case by the party’s own fault. *Id.*
 7 Here, as amply explained above, we are dealing not with “newly discovered” evidence, but with
 8 *newly created* evidence, which cannot provide the basis to avoid the preclusive effect of these
 9 previous judgments any more than they can justify reconsideration.

10 A final judgment is a conclusive determination of the issues. Just as a party cannot
 11 manufacture new evidence to avoid a final judgment under Rule 60 or seek a new trial under Rule
 12 59, a party cannot use newly created evidence to avoid the preclusive effect of a previous
 13 judgment in a new suit in that same context. *See, e.g., FM Indus.*, 2008 WL 4722086, at *1.

14 Courts in this District have ruled on no less than five separate occasions that Righthaven
 15 lacks standing to pursue actions based on purportedly assigned copyrights from Stephens Media,
 16 regardless of any claimed amendments. June 14 Decision at *4; *Hoehn*, 2011 WL 2441020, at
 17 *6; *Mostofi*, 2011 WL 2746315 (same); *DiBiase*, 2011 WL 2473531, at *1 (dismissing for lack of
 18 standing and incorporating the reasoning of both *Hoehn* and *Democratic Underground*);
 19 *Righthaven LLC v. Barham*, 2011 WL 2473602, at *1 (D. Nev. June 22, 2011) (same). These
 20 cases have recognized that the clear intent of the parties was to vest Righthaven solely with the
 21 right to sue, a result prohibited by *Silvers*. *See* June 14 Decision at *3. Three of these decisions
 22 have since been reduced to judgment. *Hoehn*, Dkt. 30; *DiBiase*, Dkt. 73; *Mostofi*, Dkt. 35.

23 Moreover, because the dismissals in *Hoehn*, *DiBiase* and *Mostofi* each found that
 24 Righthaven did not own the copyrighted work at issue, they are final judgments on the merits. As
 25 Righthaven has conceded, the first element of copyright infringement is ownership of a copyright.
 26 *See* RH Motion for Voluntary Dismissal (Dkt. No. 36) at 16 (the “law is venerable that to prove
 27 copyright infringement, one must demonstrate . . . ownership of the allegedly infringed work.”);
 28 *see also Feist Publ’ns, Inc. v. Rural Telephone Serv. Co., Inc.*, 499 U.S. 340, 361 (1991).

1 Accordingly, Righthaven cannot avoid the preclusive effect of the adjudications of its lack of
2 ownership because the same lack of ownership precluded standing. *See, e.g., Pannonia Farms,*
3 *Inc. v. Re/Max Int'l, Inc.*, 407 F. Supp. 2d 41, 43 (D. D.C. 2005) (plaintiff collaterally estopped
4 from bringing copyright infringement claim by prior decision finding plaintiff lacked standing).
5 “[A]lthough both subject matter jurisdiction and standing (as well as other questions of
6 justiciability) act to limit the power of federal courts to entertain claims, that is, act to limit the
7 courts’ ‘jurisdiction’ in the broadest sense of the term, the two must be treated distinctly.”
8 *HyperQuest, Inc. v. N’Site Solutions, Inc.*, 559 F. Supp. 2d 918, 920 (N.D. Ill. 2008), *aff’d* 632
9 F.3d 377 (7th Cir. 2011) (quoting *Rent Stabilization Ass’n v. Dinkins*, 5 F.3d 591, 594 n.2 (2d Cir.
10 1993)). Here, Righthaven’s lack of standing is intertwined with the merits issue of ownership,
11 meaning that a dismissal on standing grounds is not a mere jurisdictional dismissal, but a
12 simultaneous dismissal on the merits. *See id.* at 921 (“There is no question that the Order
13 dismissed HQ’s action with prejudice—because HQ lacks standing, it cannot bring suit again.”)
14 Indeed, courts routinely dismiss claims with prejudice when the plaintiff is found not to have
15 standing. *Sybersound Records, Inc. v. UAV Corp.*, 517 F.3d 1137 (9th Cir. 2008) (affirming
16 dismissal with prejudice for lack of standing); *Gerlinger v. Amazon.com Inc.*, 526 F.3d 1253 (9th
17 Cir. 2008) (same); *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004) (holding
18 when “[t]he question of jurisdiction and the merits of [the] action are intertwined,” dismissal for
19 lack of subject matter jurisdiction is improper, and accordingly reviewing the district court’s
20 order “not as a dismissal for lack of subject matter jurisdiction but rather as a grant of summary
21 judgment on the merits[.]”); *Williston Basin Interstate Pipeline Co. v. An Exclusive Gas Storage*
22 *Leasehold & Easement in the Cloverly Subterranean*, 524 F.3d 1090, 1094 (9th Cir. 2008) (“such
23 an intertwining of jurisdiction and merits may occur when a party’s right to recovery rests upon
24 the interpretation of a federal statute that provides both the basis for the court’s subject matter
25 jurisdiction and the plaintiff’s claim for relief.”); *Lerner v. Fleet Bank*, 318 F.3d 113, 116-17 (2d
26 Cir.2003) (lack of standing did not divest court of jurisdiction over the action, because standing
27 was sufficiently intertwined with the merits of the claim, and affirming the district court’s
28 granting of defendant’s motion to dismiss plaintiffs’ civil RICO claim with prejudice not for lack

1 of subject matter jurisdiction, but for failure to state a claim).

2 Righthaven cannot avoid the force of these judgments and their conclusions about the
3 collusive nature of its agency for Stephens Media by inventing new facts in the Restated
4 Amendment. Nor, having had the front door slammed on its affirmative complaint, may
5 Righthaven try again through the back door of purported “intervention.” The Court’s conclusion
6 that Righthaven was *not* intended to have ownership of any rights, and that Stephens was
7 intended to retain complete control, is not subject to relitigation.

8 **2. In any Event, the Restated Amendment Cannot Mask the True Role of**
9 **Righthaven as a Mere Agent for Stephens Media.**

10 Even if Righthaven were not barred from arguing the point, it is frankly absurd for
11 Righthaven to claim now that it has suddenly decided to comply with *Silvers* and function as
12 anything other an agent of Stephens Media with the sole purpose of pursuing actions for copyright
13 infringement. The truth is that under the Restated Amendment, as under the SAA and
14 Clarification, Righthaven is still merely Stephens Media’s hired gun, with no independent rights
15 or standing to pursue infringement claims as required by *Silvers*.

16 For over a year and a half, Righthaven has operated as the agent of Stephens Media. *See*
17 June 14 Decision at *7 (noting that Stephens directed Righthaven’s efforts to sue). In addition to
18 having to share 50% of all proceeds with Stephens Media, the remaining 50% flows into a
19 company (Righthaven) in which Stephens Media’s affiliate (SI Content Monitor) owns 50% of
20 the company. RHOA Ex. 18-1; SSA § 2 (providing that Righthaven must be owned by a
21 Stephens Media affiliate controlled by the same entities that control Stephens Media).
22 Righthaven was limited by the original SAA, then the Clarification, as well as by its own
23 Operating Agreement to bringing suits for infringement at Stephens Media’s direction and under
24 Stephens Media’s control. *See* June 14 Decision at *6; *Hoehn*, 2011 WL 2441020, at *6; Dkt.
25 107 (analyzing Clarification). The RHOA defines Righthaven’s purpose as to obtain “a limited,
26 revocable assignment (with license-back) of copyrights from third Persons in order to enable the
27 Company to recover damages associated with Identified Infringements.” RHOA § 3.2(c).
28 Righthaven was never intended to exploit any purportedly assigned copyrights other than through

1 litigation. The RHOA states that an assignor, like Stephens Media, not Righthaven, “would
2 ultimately enjoy the copyright registration upon revocation of the assignment.” *Id.* § 3.2(d).

3 Even the Restated Amendment acknowledges that it was created only because this Court
4 “held that the SAA and Amendment were insufficient to transfer sufficient copyright ownership
5 to Righthaven such that it had *standing to sue* for infringement.” Restated Amendment at 1
6 (emphasis added). This third rewriting of the SAA, by its terms, was not motivated by a desire to
7 empower Righthaven to do anything other than sue; it was motivated by a desire to provide a
8 patina for a claim of adequacy under *Silvers*. As Righthaven’s own witness declared, the parties’
9 intent is to preserve the rights of “Stephens to continue to display or otherwise use the assigned
10 content through the grant of a license from Righthaven.” Hinueber Decl. (Dkt. 101) ¶ 6; *see also*
11 Gibson Decl. (Dkt. 102) ¶ 6. In short, Stephens Media intends to maintain its ownership, as if the
12 SAA did not change a thing but the right to sue.

13 The Restated Amendment is just another attempt by contract to accomplish this illegal
14 objective. Most tellingly, the fundamental premise of the Restated Amendment is one this Court
15 has already found to be false. It recites that “the intent of the Parties in entering in the SAA and
16 Amendment was to convey all ownership rights in and to any identified Work to Righthaven.”
17 Restated Amendment at 1; *see also id.* § 8 (incorporating recitals as substantive terms). Yet this
18 Court found that “the plain language of the SAA conveys the intent to deprive Righthaven of any
19 right, save for the right to sue alleged infringers and profit from such lawsuits.” June 14 Decision
20 at *4. Righthaven and Stephens Media cannot, by waving a pen when they choose, change their
21 past intentions to the opposite of what this Court adjudicated, let alone come into bona fide
22 compliance with *Silvers* by doing so.

23 Just as transparently, the Restated Amendment creates bizarre contradictions with its
24 predecessors. These extend beyond the mutating grants of licenses back from Righthaven to
25 Stephens Media—a grant first labeled “exclusive,” then “clarified” to be “non-exclusive” but with
26 Stephens Media retaining a veto over every subsequent license by Righthaven, and now, in the
27 Restated Amendment, purportedly erasing the veto. Restated Amendment ¶ 7.2.
28

1 Indeed, the Restated Amendment shows that the now defunct Clarification was nothing
 2 more than an attempt to dig out of the well created by Righthaven’s original, and now sanctioned,
 3 failure to disclose the SAA. Take, for example, the Clarification’s \$1 per year licensing fee
 4 payable by Stephens Media. Righthaven and Stephens Media inserted this provision into the
 5 Clarification, claiming it reflected the parties’ intent all along. *See e.g.*, Dkt. 100 at 5 (claiming
 6 the Clarification’s purpose was to “clarify and effectuate, to the extent not already accomplished,
 7 what has at all times been the intent of the parties”). Righthaven did not explain why the parties’
 8 supposed intent to have a license fee was overlooked in drafting the first version. The likely
 9 explanation: this new provision was a pretense, designed solely to gin up the subsequent
 10 argument that Righthaven was the “beneficial owner,” and therefore entitled to sue. *See id.* at
 11 10.⁹ Given that the provision has now disappeared from the Restated Amendment, and there is no
 12 evidence any royalties were ever paid, it is difficult to see it as anything other than an attempt to
 13 convince the Court to accept a fiction and then issue a decision premised on it.

14 Likewise, under the Clarification, the parties asserted that it “would cause Stephens Media
 15 irreparable harm” if Righthaven exploited any of the “assigned” works by granting even one
 16 license to which Stephens did not approve. Clarification ¶ 7.2. As Judge Pro summarized, under
 17 the Clarification, “Stephens Media may obtain injunctive relief against Righthaven to prevent
 18 such ‘irreparable harm’ and, pursuant to the Clarification, Righthaven has no right to oppose
 19 Stephens Media’s request for injunctive relief.” *Hoehn*, 2011 WL 2441020, at *6. Righthaven’s
 20 entry into competing licenses could present a serious problem for Stephens Media’s exploitation
 21 (in secondary compilations like Lexis-Nexis, for example). *See part IV, infra.* Stephens Media
 22 was therefore quite concerned and required a right to reject every license. But now Righthaven
 23 wants this Court to believe that Stephens Media will exercise no sway over Righthaven’s rights to
 24 license to anyone and everyone—that Stephens Media would have no problem with such
 25 “irreparable” harm. This is so even though the Clarification had such a strong provision, and
 26 even though, as this Court held, the original “SAA was anything but silent in making sure that
 27

28 ⁹ As Democratic Underground previously explained, this argument was specious. Dkt. 107 at 8, n.5.

1 Stephens Media retained complete control over the Work rather than actually effectuate the
 2 necessary transfer of rights. The entirety of the SAA is concerned with making sure that
 3 Righthaven did not obtain any rights other than the right to sue.” June 14 Decision at *5. That
 4 the parties to the SAA can so blithely recast their agreement—disregarding all the purported
 5 economics—reconfirms this Court’s recognition that the parties’ goal has always been to try to
 6 establish Righthaven’s right to sue, and nothing more.

7 The Restated Amendment is also replete with internal contradictions. Despite the
 8 purported change in ownership of the copyright, Stephens Media may still maintain its funding
 9 securitization. Restated Amendment ¶ 9.3. Apparently, Stephens Media has used its copyrights
 10 as collateral for financing and needs this provision to avoid problems with lenders. However, the
 11 Restated Amendment’s contractual fancy dancing cannot avoid the fundamental problem: “a
 12 mortgage . . . or any other . . . hypothecation of a copyright” is a “transfer of copyright
 13 ownership.” 17 U.S.C. § 101. This is something that a non-exclusive licensee cannot do, even
 14 with the licensors’ permission.

15 Several other provisions of the original SAA remain curiously unchanged. Pursuant to
 16 Section 9.4, Stephens Media still might settle an infringement action. Section 10.2 still
 17 contemplates that a “Recovery Instrument” might be in Stephens Media’s name. Section 11 still
 18 acknowledges that Stephens Media may be liable for attorneys’ fees for an infringement action.
 19 The unchanged provisions, of course, reflect the truth underlying the transaction: that Stephens
 20 Media is the true owner.

21 *Silvers* requires that the Court look beyond formal recitations to practical reality of the
 22 relationship between the parties. *See Nafal*, 540 F. Supp. 2d at 1144 (rejecting standing for a
 23 “glorified non-exclusive licensee” noting that court’s cannot “ignore[] reality” in the application
 24 of *Silvers* nor accept “formalistic labels” attached by the parties). No matter what Righthaven
 25 and Stephens Media attempt to conjure up with this or any “amendment,” it cannot change the
 26 true fact, already determined by this Court, that Stephens Media is the real party in interest and
 27 the only party with any actual ability to exploit the assigned works. Righthaven’s proffered
 28 interest in this litigation fails and its application to intervene should be denied.

1 **3. The Restated Amendment is Champertous, Against Public Policy, and**
 2 **Unenforceable.**

3 The Restated Amendment additionally cannot provide Righthaven any substantial
 4 protectable interest in this litigation because it constitutes illegal champerty and accordingly is a
 5 nullity. *See* William Patry, 2 PATRY ON COPYRIGHT, § 5:136 at 5-293 (2009) (noting that in
 6 copyright litigation, “the successful assertion of [champerty] results in the voiding of the
 7 champertous agreement”).

8 Nevada law recognizes that a champertous contract is void.¹⁰ *Incline Energy, LLC v.*
 9 *Penna Group, LLC*, 2011 WL 1304710, at *4 n.2 (D. Nev. Apr. 1, 2011) (“in Nevada a
 10 champertous agreement is not only voidable, but void.”) (citing *Schwartz v. Eliades*, 113 Nev.
 11 586, 588 (Nev. 1997); *see also DiBiase*, Righthaven Response to Motion to Dismiss (Dkt. 55) at
 12 17 (conceding “[t]he doctrine of champerty is recognized under Nevada law.”). Under Nevada
 13 law, “[t]o maintain the suit of another is now, and always has been, held to be unlawful, unless
 14 the person maintaining has some interest in the subject of the suit.” *Lum v. Stinnett*, 87 Nev. 402,
 15 408 (Nev. 1971) (citing *Gruber v. Baker*, 20 Nev. 453 (Nev. 1890)). “A champertous agreement

16 _____
 17 ¹⁰ Last week, the Ninth Circuit issued its opinion in the appeal of *Del Webb Communities, Inc. v. Partington*, 2009
 18 WL 3053709 (D. Nev. Sept. 18, 2009). *See Del Webb Communities, Inc. v. Partington*, Case No. 10-15975 (9th Cir.
 19 July 20, 2011). On the facts before it, the Ninth Circuit “reject[ed] the district court’s reliance on Nevada’s common
 20 law of champerty to create a tort cause of action for which Del Webb could obtain relief.” *Id.* No champerty tort
 21 claim is at issue in this case; instead the question is whether the champertous agreement is void. Pursuant to the
 22 Nevada cases cited herein, it is.

23 Righthaven’s argument elsewhere (*Pahrump Life*, Dkt. 62) that champerty cannot provide a defense other than to a
 24 party to the champertous agreement overstates the holding of *Del Webb*, which did not involve such a defense and
 25 therefore could not and did not rewrite Nevada law on that issue. The *Del Webb* Court noted that no Nevada
 26 Supreme Court decision had ever endorsed a tort remedy for champerty and refused to extend the law to do so. In
 27 reaching its decision, the *Del Webb* Court found statements indicating that the Nevada Court did not favor broad
 28 extension of the champerty defense, including reasoning from *Prosky v. Clark* that “the great weight of authority is to
 the effect . . . that the rule rendering contracts void for champerty cannot be invoked except between the parties to the
 champertous agreement in cases in which such contract is sought to be enforced.” *Del Webb*, Case No. 10-
 15975 at 9956, citing *Prosky v. Clark*, 109 P. 793, 794 (Nev. 1910). This statement, describing the “weight of
 authority” rather than any holding in *Prosky*, was dicta in *Prosky* as well as *Del Webb*—but in it did logically imply
 to the Ninth Circuit that Nevada Supreme Court was unlikely to *expand* champerty to create an affirmative cause of
 action.

The *Del Webb* Court also noted that “two other Nevada Supreme Court cases suggest that champerty may have a
 somewhat broader application than *Prosky* indicates.” In particular, both *Gruber v. Baker*, 24 P. 858 (Nev. 1890),
 and a much later case, *Lum v. Stinnett*, 87 Nev. 402, 408 (Nev. 1971), affirmed champerty defenses that exculpated
 entities not parties to the champertous contract—in the former a defendant in a fraud action brought by an assignee,
 and in the latter a defendant of a claim maintained by an insurance carrier for the real party in interest. The *Del Webb*
 court did not find that *Prosky*’s dictum prevailed over these two Nevada Supreme Court holdings. It found only that
 subsequent expressions of the Nevada Supreme Court had downplayed the significance of the champerty defenses in
 those two cases, so as to “make them poor support for expanding the doctrines” to create a tort claim. Slip Op. at 10-
 11 and n. 10. Thus, *Lum* and *Gruber* remain good law, and continue to support the vitality of champerty as a defense
 by non-parties to the contract, even if not as a tort claim.

1 is one in which [i] a person without interest in another’s litigation [ii] undertakes to carry on the
2 litigation at his own expense, in whole or in part, [iii] in consideration of receiving, in the event of
3 success, a part of the proceeds of the litigation.” *Martin v. Morgan Drive Away, Inc.*, 665 F.2d
4 598, 603 (5th Cir. 1982), *cert. dismissed*, 458 U.S. 1122 (1982) (quoted with approval by the
5 Nevada Supreme Court in *Schwartz*, 113 Nev. at 588). In the copyright context a sham
6 assignment designed to hide the parties’ true intent to transfer only the right to sue constitutes
7 champerty. *See* PATRY ON COPYRIGHT, *supra* at § 5:136.

8 Now, as ever, under the Restated Amendment, Righthaven’s conduct squarely fits this
9 definition. Just as before, Righthaven began with no genuine interest in any alleged infringement
10 of the *Review-Journal* article—no one disputes this point. Further, Righthaven has undertaken
11 Stephens Media’s copyright litigation at its own expense. *See* SAA ¶ 6 (“Righthaven shall be
12 responsible for all Costs incurred in an Infringement Action.”) (unchanged by Restated
13 Amendment). Again, this is undisputed. Third, Righthaven has done so with the expectation of
14 receiving a part of the litigation proceeds in the event of success. SAA ¶ 5 (providing Righthaven
15 a 50% split of the Recovery (less costs), unchanged by Restated Amendment). Likewise,
16 undisputed. As an unlawful and champertous agreement under Nevada law, Righthaven and
17 Stephens Media’s Restated Amendment is void and cannot confer standing or any interest by
18 Righthaven in this litigation.

19 That the Restated Amendment now purports to convey an ownership interest in the
20 copyrights free of some of the restrictions of its predecessor drafts does not change the champerty
21 analysis. The most recent amendment is merely the next instrument designed to accomplish the
22 champertous scheme. As Righthaven admits, it executed this latest Restated Amendment in an
23 effort to empower Righthaven to sue because this Court rejected its standing before, and for no
24 other reason. Restated Amendment at 1. Executing a document designed to assist a champertous
25 scheme to appear to comply with *Silvers* makes it no less champertous, and no less illegal.
26 Indeed, if a champertous scheme could, once challenged, be immunized by mid-stream
27 reallocation of interests between the parties, the doctrine would be eviscerated: the parties could
28 always reallocate ownership after the fact and accomplish thereby their illegal objective.

1 **4. The Restated Amendment Amounts to an Illegal Attempt to Practice**
 2 **Law Without a License.**

3 Independently, as has been persuasively argued by Amicus Citizens against Litigation
 4 Abuse, Inc., Righthaven's entire business model and relationship with Stephens Media are also
 5 illegal as constituting the unauthorized practice of law. *See generally* Dkt. 132. Under the
 6 Restated Amendment, as with the previous SAA and Clarification, Righthaven remains, in
 7 essence, a law firm taking cases on a contingency fee basis, masquerading as a business. *Id.* at 4-
 8 13. Righthaven takes an "assignment" from Stephens Media in exchange for a 50% share in
 9 recovery. That "assignment," solely for purposes of facilitating a lawsuit, is nothing but an illicit
 10 contingency fee agreement. This exact arrangement has been repeatedly rejected by courts across
 11 the country as illegal; it cannot form the basis for standing here.¹¹ *Id.*

12 This Court recognized this point in the recent order imposing Sanctions. OSC Ruling
 13 at 14 ("In the Court's view, the arrangement between Righthaven and Stephens Media is nothing
 14 more nor less than a law firm, which incidentally, I don't think is licensed to practice law in this
 15 state, but a law firm with a contingent fee agreement masquerading as a company that's a party").
 16 A law firm may not lawfully take cases from its clients to sue on them in its own name. *See, e.g.,*
 17 *Bay County Bar Ass'n. v. Finance Sys., Inc.*, 345 Mich. 434 (1956). For a law firm to do so
 18 without even qualifying to practice in the state or Court is doubly illegal.¹²

19 In sum, Righthaven's relationship with Stephens Media is improper and cannot provide
 20 Righthaven with the right to intervene. Moreover, given that Righthaven has no substantial
 21 protectable interest in this litigation, as a matter of common sense it is not possible for there to be
 22 any impairment of those interests. Independently, for each of the reasons discussed above,

23 _____
 24 ¹¹ Moreover, even in the collection context, raised elsewhere by Righthaven (*Righthaven LLC v. Pahrump Life*, No.
 25 10-cv-10575, Dkt. 62 at 9), courts recognize that where a party assigns the right to collect on a judgment to another
 while maintaining and interest in the recovery, they may be engaged in the unauthorized practice of law. *In re*
Brooms, 447 B.R. 258, 266 (9th Cir. BAP 2011) ("[i]f Jorgenson retained any interest in the Judgment or any
 recovery thereon, then Carter was engaging in the unauthorized practice of law by representing another party when
 he is not a licensed attorney").

26 ¹² Democratic Underground also notes that under the Nevada Rules of Professional Conduct, a law firm may not
 27 share legal fees with a non-lawyer or have non-lawyer investors. Nev. R. Prof. Conduct 5.4. Righthaven is owned by
 Net Sortie Systems LLC (Steve Gibson's shell company) and SI Content Monitor LLC (an investment vehicle for
 28 members of the family of billionaire Warren Stephens who also own Stephens Media). RHOA Ex. 18-1; *see also*
 SAA § 2. Contrary to the Rules, the "Recovery" that Righthaven splits with Stephens Media includes attorneys' fees.
See SAA, Schedule 1 – Definitions at 14.

1 Righthaven's request for intervention should be denied.

2 **III. THE RESTATED AMENDMENT CANNOT PROVIDE RIGHTHAVEN A BASIS**
 3 **TO INTERVENE OR STEPHENS MEDIA A BASIS FOR RECONSIDERATION**
 4 **AS IT PERPETUATES A FRAUD ON THE COURT.**

5 Additionally, this Court should reject both the application for intervention and the motion
 6 for reconsideration because the Restated Amendment furthers Righthaven and Stephens Media's
 7 propagation of a fraud on the Court. "A 'fraud on the court' is 'an unconscionable plan or
 8 scheme which is designed to improperly influence the court in its decision.'" *Phoceene Sous-*
 9 *Marine S.A. v. U.S. Phosmarine, Inc.*, 682 F.2d 802, 805 (9th Cir. 1982) (quoting *England v.*
 10 *Doyle*, 281 F.2d 304, 309 (9th Cir. 1960)). In response to a fraud upon the court, "the courts have
 11 inherent power to dismiss an action or enter a default judgment to ensure the orderly
 12 administration of justice and the integrity of their orders." *Id.* at 806; *see also Wyle v. R.J.*
 13 *Reynolds Indus., Inc.*, 709 F.2d 585, 589 (9th Cir. 1983) ("courts have inherent power to dismiss
 14 an action when a party has willfully deceived the court and engaged in conduct utterly
 15 inconsistent with the orderly administration of justice.")

16 Democratic Underground does not make this accusation lightly, recognizing that fraud on
 17 the court "embraces only that species of fraud which does or attempts to, defile the court itself, or
 18 is a fraud perpetrated by officers of the court." *Appling v. State Farm Mut. Auto. Ins. Co.*, 340
 19 F.3d 769, 780 (9th Cir. 2003) (citing *In re Levander*, 180 F.3d 1114, 1119 (9th Cir. 1999)). A
 20 party's failure to disclose information, or even a party's perjury, does not ordinarily constitute
 21 fraud on the court. *Id.* However, "when false evidence or testimony is provided under oath,
 22 knowingly and with intent to deceive, a party commits a fraud on the court." *Garcia v. Berkshire*
 23 *Life Ins. Co. of America*, 569 F. 3d 1174, 1181 (10th Cir. 2009) (distinguishing "deceptions [that]
 24 concerned the issues in controversy, rather than an attempt to delay discovery or trial").

25 **A. Righthaven Has Repeatedly Misrepresented the True Nature of its**
 26 **Relationship with Stephens Media to this Court and Attempted to Hide it**
 27 **from Litigants and the Court.**

28 Intentional misrepresentation is precisely what has happened here. Sanctions Minute
 Order (Dkt. 138) (holding that "Righthaven made intentional misrepresentations to the Court").
 Righthaven has gone well beyond a simple failure to disclose Stephens Media's direct pecuniary

1 interest in this and its hundreds of other cases in this district or presenting “multiple inaccurate
2 and likely dishonest statements to the Court.” June 14 Decision at *9. As this Court noted:
3 though one could “call it failure to disclose . . . a stronger term is justified.” OSC Ruling at 17.

4 Led by Steven Gibson (Righthaven’s CEO, counsel of record at the inception of this
5 action, and an officer of the court), Righthaven and Stephens Media cooked up a scheme to defile
6 the integrity of the Court by manufacturing a false “Assignment” form to present to litigants and
7 the courts. Not only was it *designed* to mislead, it in fact *did* mislead “the district judges of this
8 district to believe that it was the true owner of the copyright in the relevant news articles.” June
9 14 Decision at *6. As a result, the prior orders in this district finding standing based upon the
10 assignment alone “were tainted by Righthaven’s failure to disclose the SAA and Stephens
11 Media’s true interest.” *Id.* at *6; *see also* Dkt. 138 (holding that “there is a significant amount of
12 evidence that Righthaven made intentional misrepresentations to the Court and also engaged in a
13 concerted effort to hide Stephens Media's role in this litigation.”).¹³

14 This Court has held that “the plain language of the SAA conveys the intent to deprive
15 Righthaven of any right, save for the right to sue alleged infringers and profit from such
16 lawsuits.” *Id.* at *4. Moreover, and as explained above, due to the final judgments against
17 Righthaven on this very issue, Righthaven is precluded from arguing that either the original SAA
18 or the May 9 Amendment intended to assign the copyrights at issue. *Clements*, 69 F.3d at 330
19 (collateral estoppel, now referred to as issue preclusion bars “the re-litigation of any issue that
20 has been actually litigated and necessarily decided”).

21 Accordingly, it is beyond cavil that, as of January 2010 when they entered the SAA, the
22 parties intended to convey only the right to sue, in contravention of *Silvers*. Righthaven has
23 admitted, however, that it knew about the *Silvers* rule. It claimed that “the manner in which the
24 [SAA] was drafted accounted for *Silvers* and any other relevant legal authorities.” Dkt. 78 at 6.

25
26
27
28 ¹³ Nevertheless, Righthaven continues to cite to these fraudulently obtained opinions. *See e.g. Righthaven v. Newsblaze*, 11-cv-00720-RCJ, Righthaven Response to Motion to Dismiss (Dkt. 13) at 11-12 (filed July 19, 2011).

1 The SAA was an intentional effort to circumvent *Silvers*' clear mandate and sue despite it.¹⁴

2 Rather than argue for a change in the law, Righthaven instead made, as this Court
 3 determined, a "concerted effort to hide Stephens Media's role in this litigation" using both a
 4 "consistent, repeated failure to identify Stephens Media as having any interest in" the lawsuits,
 5 and making representations that were "intentionally untrue." OSC Ruling at 15-16. The
 6 "Copyright Assignment" speaks vaguely of unidentified "monetary commitments and
 7 commitment to services provided" (Gibson Decl., Dkt. 102 Ex. 1) rather than disclosing that
 8 Stephens Media got 50% of the proceeds. Moreover, the "Copyright Assignment" characterized
 9 itself as a transfer of "all copyrights requisite to have Righthaven recognized as the copyright
 10 owner," obscuring what rights were transferred—which turned out to be only the right to sue.

11 As explained in Democratic Underground's Reply to Righthaven's Response to the OSC
 12 re Sanctions, "[t]he purpose of this design is obvious. In litigation, Righthaven could and did trot
 13 out a copy of the one-page Assignment, assert a presumption of ownership based on its
 14 fraudulently obtained copyright registration, and yet keep the true nature of the transaction
 15 secret." Dkt. 133 at 9; *see also* OSC Ruling at 15 (Righthaven "claimed that it had various
 16 exclusive rights when it knew that the ability to exercise those rights were retained exclusively by
 17 Stephens Media. It constantly and consistently refused to produce the [SAA] agreement.")

18 More insidiously, Righthaven's design takes advantage of the economics of nuisance
 19 litigation. As this Court also recognized, "Righthaven and Stephens Media have attempted to
 20 create a cottage industry of filing copyright claims, making large claims for damages and then
 21 settling claims for pennies on the dollar." Dkt. 94 at 2; *see also Righthaven, LLC v. Hill*, 1:11-cv-
 22 00211-JLK (Dkt. 16) at 2 (D. Colo. April 7, 2011) ("Plaintiff's wishes to the contrary, the courts
 23 are not merely tools for encouraging and exacting settlements from Defendants cowed by the
 24 potential costs of litigation and liability."); *Raylon, LLC v. EZ Tag Corp.*, 6:09-cv-00357-LED,

25
 26 ¹⁴ Righthaven and Stephens Media's Clarification did not change that result, and Righthaven's suggestion in its
 27 Motion to Intervene that the SAA and Clarification are in line with general intellectual property licensing practices is
 28 incorrect. Dkt. 120 at 5-8. This point was extensively argued in Democratic Underground's amicus brief in the
Pahrump case in front of Judge Mahan (*Pahrump Life*, Dkt. 50), but suffice it to say, that none of the cases cited by
 Righthaven deal with a case where a party attempted to create rights in a copyright following multiple court
 judgments holding that they had none.

FENWICK & WEST LLP
ATTORNEYS AT LAW
SAN FRANCISCO

1 (Dkt. 115) at 5 (E.D. Tex. Mar. 9, 2011) (lambasting “plaintiffs who file cases with extremely
2 weak infringement positions in order to settle for less than the cost of defense and have no
3 intention of taking the case to trial. Such a practice is an abuse of the judicial system and
4 threatens the integrity of and respect for the courts.”)

5 Righthaven knew that, before anyone could get to the SAA and challenge its scheme, the
6 defendant would need to file a responsive pleading, hold a Rule 26 conference, exchange initial
7 disclosures, issue requests for the production of documents, negotiate a protective order, meet and
8 confer about Righthaven’s refusal to provide documents, move to compel, win the motion to
9 compel and then move to dismiss.¹⁵ All the while, the defendants would need to fight against
10 Righthaven’s efforts to “needlessly increase[] the costs of litigation.” Dkt. 138. If *pro bono*
11 attorneys had not stepped in to defend some of these actions and uncover the SAA, Righthaven
12 may well have continued its unlawful scheme indefinitely.

13 **B. The Restated Amendment Is Just the Next Step in this Fraud.**

14 The new revision to the SAA is nothing more than an attempt to further the fraud on this
15 Court. While Stephens Media and Righthaven continue to behave as they always have, and the
16 true nature of their transaction is not substantively changed, they hope that they can keep
17 adjusting the language of the SAA until they find the magic words that turn *Silvers* into a dead
18 letter. No matter how many times they change the labels, the Court need not be deceived.

19 Moving beyond the parties’ re-chosen words, it is patent that the Restated Amendment
20 does not reflect the truth about the actual ownership of the copyright. For example, in 2002,
21 Stephens Media granted ProQuest the [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED] That license also provides that [REDACTED]

26 [REDACTED]

27 ¹⁵ For example, Defendant Tad DiBiase filed a fee motion in *Righthaven v. DiBiase* showing that the costs of such an
28 endeavor were close to \$120,000, even after a substantial discount. *DiBiase*, 2:10-cv-01343, Motion for Attorneys
Fees (Dkt. 78).

FENWICK & WEST LLP
ATTORNEYS AT LAW
SAN FRANCISCO

1 [REDACTED] Thus, during the term of the ProQuest agreement, [REDACTED]
2 [REDACTED]
3 [REDACTED]—yet the Restated Agreement purports to do
4 exactly that. *See* 17 U.S.C. § 101 (defining an exclusive license as a transfer of ownership).

5 Similarly, Stephens Media’s license with BurrellesLuce provides that [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED] Yet, Righthaven has
9 represented to the Court that it “has not engaged in the commercial exploitation of news articles”
10 and “has not derived revenue” from the news articles.¹⁶ *Righthaven v. DiBiase*, Opposition to
11 Motion to Compel, Dkt. 68 at 5.

12 The *Las Vegas Review Journal* uses the ShareThis application on the page of each story it
13 publishes, including, to this day, the News Article at issue here. Webb Decl. Ex. 6. In its deal
14 with ShareThis, Stephens Media warranted that it “own[s] or otherwise control[s] *all* of the rights
15 to the” content that will be shared or accessed through the ShareThis Application. Webb Decl.
16 Ex. 4. (SM000021) (emphasis added). Moreover, Stephens Media purports to “grant a
17 worldwide, non-exclusive, assignable, fully paid up, and royalty free license” to ShareThis. *Id.*
18 (SM000018). This representation is entirely inconsistent with its purported grant to Righthaven
19 of all exclusive rights in the News Article (that is still available through ShareThis).

20 Likewise, pursuant to Stephens Media’s deal with Lexis-Nexis, [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 This representation, too, is contrary to the purported grant to Righthaven of all exclusive rights,
24 which Lexis-Nexis would infringe by making the News Article available—as it does today.
25 Webb Decl. ¶ 5.

26
27
28 ¹⁶ Righthaven did assert an exception to this blanket statement – the short-lived \$1/year licensing fee set forth in the now defunct Amended SAA. As explained above, this license fee was a sham.

1 A non-exclusive licensee, as Stephens Media purports to be, has no right to sublicense,
 2 absent an explicit provision. *See Harris v. Emus Records Corp.*, 734 F.2d 1329 (9th Cir. 1984)
 3 (under the 1909 Copyright Act); *Gardner v. Nike, Inc.*, 279 F.3d 774, 781 (9th Cir. 2002)
 4 (applying rule in *Harris* to 1976 Copyright Act); William Patry, PATRY ON COPYRIGHT § 5:127 at
 5 5-263 (a nonexclusive licensee may not, “absent authorization, sublicense.”) The Restated
 6 Amendment contains no provision allowing sublicensing. Nevertheless, the news article at issue
 7 in this litigation remains available through ShareThis and on Lexis. Webb Decl. ¶¶ 4, 5 and Ex 6.

8 Despite these (and other) licensing arrangements in which Stephens Media has been
 9 participating since before January 2010, the Restated Amendment asks this court to recognize it
 10 as a retroactive transfer of ownership. Of course, neither Stephens Media nor Righthaven present
 11 any evidence that Stephens Media has paid over any royalties it received retroactive to the date
 12 Righthaven became the “owner,” or that the licenses discussed above have been assigned or
 13 otherwise transferred to Righthaven. The reason is simple: Righthaven’s new-found “ownership”
 14 exists only on one piece of paper, fabricated solely for the purpose of presenting a new argument
 15 to the court. The truth is reflected in the original SAA and the Clarification, which protected
 16 these license arrangements by preventing Righthaven from exploiting the *Las Vegas Review-*
 17 *Journal* articles.

18 The Restated Amendment is nothing but a fraud and Righthaven and Stephens Media’s
 19 presentation of it to this Court are inexcusable. It cannot support Righthaven’s request for
 20 intervention or Stephens Media’s motion for reconsideration.

21 CONCLUSION

22 For the foregoing reasons, Counterclaimant Democratic Underground LLC respectfully
 23 requests that this Court deny Righthaven’s Motion to Intervene and Stephens Media’s Motion for
 24 Reconsideration.

25 Dated: July 26, 2011

FENWICK & WEST LLP

26
 27 By: /s/ Laurence F. Pulgram

Laurence F. Pulgram
 Attorneys for Defendant and Counterclaimant
 DEMOCRATIC UNDERGROUND, LLC